Court Implementation of the Adoption and Safe Families Act (ASFA)

Part 1 Child Protective Proceedings

I. Summary of ASFA

In November of 1997, federal child welfare legislation known as the Adoption and Safe Families Act (Public Law 105-89) was enacted. It is successor legislation to Public Law 96-272 commonly referred to as the "Reasonable Efforts Legislation" and it amends title IV-B and IV-E of the Social Security Act .

Titles IV-B and IV-E provide substantial funding to states for child welfare activities. Funding under Part IV-B is generally for activities related to Protective Services (including family preservation activities). Funding under Part IV-E is generally for foster care activities including the administrative and direct costs of placing children in out-of-home care. IV-E eligible children are funded with a mix of 50% federal and 50% state dollars. When IV-E can be utilized, there is no cost to the county for placement in out-of-home care.

A child's eligibility for IV-E dollars is determined by the Family Independence Agency (FIA) worker within a month or so of the child being placed out of the home. In addition to FIA certification of a number of eligibility factors, there are requirements for several determinations which must be made by the court. These judicial determinations must be made in a timely and accurate manner or the child could be ineligible for IV-E funding for the remainder of the time he/she spends in foster care.

II. Legislative Intent

There are five primary themes in the ASFA statute:

- Child safety must be the first priority.
- Except for certain egregious cases, reasonable efforts to preserve and/or reunify families must be made and certified by judicial determination.
- Foster care should be temporary, and permanency planning should begin immediately upon removing the child from home.
- Results should be measured to insure accountability.
- Innovative approaches to permanency planning should be encouraged.

III. Compliance and Accountability for ASFA Requirements

Regulations have been issued by the Children's Bureau of the Department of Health and Human Service which clarify the statute (Code of Federal Regulations T.45, Subt. B, Ch. XIII, Subch. G, Pt 1355, 1356, 1357). As part of the legislative mandate for accountability, the regulations require two reviews to determine state compliance with ASFA. The first review will evaluate compliance with the requirements for IV-E reimbursement for placement expenses. A poor outcome on this review could result in the payments for a child's placement being disqualified.

A second more extensive evaluation, known as the Child and Family Review, conducted onsite by the Children's Bureau, will assess compliance with the ASFA statute and will look at how Michigan is doing on a variety of outcome measures related to ASFA. A poor performance on the Child and Family Review could result in significant deductions of IV-E funding for FIA administrative costs. A chart which outlines the ASFA requirements that will be evaluated in each review is included in the appendix as Attachment A.

Michigan is not scheduled for its first IV-E eligibility review until 2004 . However, the Child and Family Services Review is scheduled for the 4th quarter of fiscal year 2002.[1]

III. Michigan's Plan for Compliance with ASFA

Many of the requirements of ASFA are already contained in the Juvenile Code as part of the first or second Binsfeld legislative packages. Others have been written into FIA policy. The State Court Administrative Office has modified and added forms for use by courts to ensure ASFA compliance. A list of these can be found in the appendix as Attachment B.

IV. Required Judicial Actions

- **In the very first court order WHICH AUTHORIZES REMOVAL[2], the court must make a judicial determination that remaining in the home is contrary to the child's welfare or best interest**. [3]

  If the court does not make this determination in its first order following the child's

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[1]This has been revised from the original document which was sent in November, 2000.

[2]This has been revised from the previous guidance memos to more accurately reflect the regulations.

[3]All judicial determinations must specify on what basis the determination is being made. Check boxes alone are not adequate. The method used to specify the rationale for the determination must be accessible to federal reviewers. Methods suggested in the regulations can be found in the appendix as Attachment C.

removal from home, the child will be ineligible for IV-E funding for the remainder of the time he/she is in foster care on that petition. Nunc pro tunc orders are not permitted.

If the court issues an ex-parte order removing the child, the "contrary to the child's welfare" finding must appear in that order; otherwise, it must appear in the first order following removal, which will usually be the order following the preliminary hearing.

- **Within 60 days of the child's removal from home, the court must find that "the agency has made reasonable efforts to prevent removal from the home." The court may also find that reasonable efforts are not required if aggravated circumstances apply which generally are the conditions set forth in MCL 722.638 of the Michigan Child Protection Law.**

If the determination regarding reasonable efforts to prevent removal is not made in the time required, the child will be ineligible for IV-E funding for the remainder of time he/she is in foster care on that petition. Nunc pro tunc orders are not permitted.

In order to meet this requirement, it is suggested that courts make this determination at the preliminary hearing. According to FIA, if the agency determines that efforts to prevent removal or reunify a family are not reasonable and the court agrees, the court can make a finding that not making efforts is reasonable. However, whenever it is determined that no reasonable efforts to reunite are necessary, a permanency planning hearing must be held within 30 days. MCL 712A.19a(2) addresses this requirement.

- **Every 12 months it is required that the court determine that reasonable efforts are being made to finalize the permanency plan whether that be return home or some other plan.**

The requirement for a judicial finding of reasonable efforts to finalize the permanency plan also applies to those cases where parents have voluntarily released their rights under the adoption code (subsequent to a child protective proceeding), and to cases where the finalization of an adoption placement is delayed beyond 12 months. FIA has agreed to notify the courts of cases where time to a finalized adoption has exceeded 12 months and a new SCAO form (PCA 351) can be used to summarize the results of review hearings on these cases.

- **If a child is placed in foster care after being home for 6 months or more, even if the return home was a "trial home visit," new determinations for IV-E eligibility must be made. A return to care after the child has been home for 6 months is considered to be a new removal.**

Part 2 Applicability of ASFA to Juvenile Justice Cases

I. Overview of Providing IV-E Funds for Placement in Juvenile Justice Cases

Public Law 105-89 and its predecessor, Public Law 96-272, provide the requirements for distributing federal funds to the states' child protection and foster care systems. There has never been an indication of legislative intent to apply the statutes and funding to cases which are part of the juvenile justice system. However, a few states, including Michigan, have utilized IV-E funding to pay for out-of-the home placements for some youth who have been adjudicated delinquent. Courts may want to discuss the impact of ASFA on the juvenile justice cases with their local FIA and determine the number of placements being funded through IV-E.

II. Requirements for IV-E Eligibility for Delinquent Youth

In order to make delinquent youth eligible for IV-E funding, ALL the statutory and regulatory requirements of ASFA must be met. This includes all of the "Required Judicial Actions" in IV of Part 1 above. These include making a judicial determination that remaining in the home is contrary to the child's best interest/welfare and all the other requirements which focus on making reasonable efforts towards the permanency plan.

There are some threshold issues which make children ineligible for IV-E regardless of what the court does. Youth in public institutions such as the Maxey Training School or the Adrian Training School are ineligible for IV- E funding. Children in "boot camps," detention facilities or closed, medium to high security facilities are also not eligible. Jurisdiction of the youth must be taken in the family division, not the criminal division, of the circuit court and FIA must be the agency who has responsibility for placement and care.

In order to retain IV-E eligibility for placement, the court is required to make a finding that reasonable efforts to achieve permanency are being made in juvenile justice cases every 12 months (just as in child protective cases). Conducting permanency planning hearings (where these findings are usually made) are a requirement of the State Plan process, however, and are not related to IV-E eligibility for placement funds. Michigan law requires permanency planning hearings in child protective cases but does not require them in juvenile justice cases. In order for FIA to comply with the general requirements of ASFA and retain their IV-E administrative funding, they are required to insure that permanency planning hearings are conducted every 12 months. These hearings must be on the record and cannot be "paper" reviews. Procedures for permanency planning hearings in juvenile justice cases need to be discussed by courts and local county FIA offices.

Eligibility for IV-E funding will effect a rather small number of adjudicated youth. In order to assist the courts in determining which children might be eligible for IV-E, FIA is compiling a document which will provide guidance about which youth will not be IV-E eligible. By using this screening tool, the court can concentrate on making the applicable judicial findings only for those youth who might be eligible.

At this time, the SCAO delinquency forms do not reflect the necessary ASFA determinations.

III. FIA Rationale for IV-E Eligibility in Juvenile Justice Cases

There are conversations both locally and nationally about the application of ASFA and IV-E funding to the juvenile justice system. The Family Independence Agency indicates that because the founding principles of the juvenile justice system stress rehabilitation and are oriented to permanency for youth, the elements of ASFA apply to some cases. They further indicate that nearly all of the youth entering the delinquency system have had numerous informal and formal interventions designed to keep the youth in their own home. Therefore, it is possible for the courts to determine that reasonable efforts to prevent removal have been made, even when the youth is being removed for a delinquent act. FIA states these prevention efforts are documented in court and FIA records and are easily accessible by the court. Examples of these services would be Families First, CMH and FIA wrap-a-round services, and numerous counseling and support programs. Regarding the ASFA requirement that the court find that keeping the youth in his/her home is contrary to the welfare of the child (not society), FIA suggests, that both may be true. They argue that even when removal of the child from the home protects society, it also may protect the child.